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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO RODRIGUEZ CONTRERAS, Defendant and Appellant.	G045063 (Super. Ct. No. 10CF1550) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Kathleen Woods Novoa, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Raquel M. Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Alfredo Rodriguez Contreras of simple false imprisonment, two counts of domestic violence with injury, domestic battery, and making a criminal threat. It returned not guilty verdicts on two additional charges of false imprisonment and making a criminal threat. At sentencing, defendant admitted suffering a prior serious felony conviction for making a criminal threat. The court denied his motions for a new trial and to strike the prior conviction for sentencing purposes and imposed an 11-year state prison term.

Defendant contends the trial court erred by denying his requests for a psychiatric evaluation of the complaining witness and admitting evidence of his alleged gang membership, and also abused its discretion in denying his motion to strike the prior serious felony conviction for sentencing purposes. We disagree with all of these claims and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

This case arose from the tumultuous relationship between defendant and E.G. The two began a dating relationship in March of 2009. Beginning in late 2009, several incidents occurred that lead to the charges brought against defendant. In June 2010, E.G. contacted the police about defendant's treatment of her and also sought a civil restraining order against him. The police arrested defendant on June 15. Thereafter, E.G. had a change of heart. She minimized defendant's actions, placed much of the blame on her own behavior and mental state, and claimed she felt "horrible" that he had been arrested based on "sad stories" told by an upset girlfriend.

The following evidence was presented at trial in support of the counts on which the jury convicted defendant. The first incident occurred in October 2009. E.G. testified she drove to defendant's sister's house to meet him. Upon her arrival, she allowed defendant to assume control of the car believing he was going to park it. But

against her wishes, defendant drove away and, holding her by either the head or the arm, refused to let her out of the vehicle.

When the prosecutor asked about defendant's demeanor during this incident, E.G. stated "[j]ust kind of normal" and said she was unsure about whether he had been drinking. The prosecutor then introduced her statements from the preliminary hearing where she testified, "'I thought he had been drinking and he was just acting crazy.'" E.G. said "that was my truthful impression of what happened at the time," but claimed since then she had "calmed down[and was] not so upset about everything." An investigator with the district attorney's office testified he recorded an interview with E.G. in late June during which she stated defendant had been drinking, she was "terrified" during the incident, and could not get out of the car because defendant was holding her.

Later called as a witness by the defense, E.G. claimed she and defendant were "mad" and "yelling" at each other, "[t]here was no normal argument with me at the time," and she was "totally out of control." She also stated, "It's pretty easy to find a trigger for me because I haven't been mentally well at all."

A second incident occurred in late April 2010. On direct examination, E.G. testified defendant hit her "a few times" with a "closed fist" because he thought she was looking at his cell phone. As a result, E.G. suffered a swollen eye. She acknowledged remaining with defendant that night, but denied being forced to do so. Questioned by the prosecutor, E.G. claimed she "just decided to spend the night" because "[i]t was already late . . . ." The prosecutor then confronted her with a declaration she presented in support of the restraining order stating, "'He made me stay with him the next 24 hours because my eye was so swollen,'" plus a similar statement she made when testifying at the preliminary hearing. E.G. responded she "was exaggerating" the incident.

E.G. initially gave several different explanations for the black eye. Both her mother and the district attorney's investigator testified E.G. claimed she had been struck with a baseball. She eventually admitted to the investigator that defendant had

struck her. The prosecutor also introduced several photographs taken shortly after the incident depicting E.G. with a black eye.

The next incident occurred on June 11, 2010. At trial, E.G. testified she and defendant argued about money and he struck her in the head and kicked her in the ribs. Her mother testified that when she saw her daughter later that day "[h]er ear was swollen, her jaw was swollen, [and] her eye eventually . . . turned black and blue . . . ." She took her daughter to the emergency room. The police officer who took the initial report two days later also testified E.G.'s "face . . . was swollen and both her eyes were in the state of blackening . . . ." Again, E.G. lied to her mother about how she was injured, first claiming it resulted from an allergic reaction and then saying she had been trampled during a soccer game. Eventually, she admitted defendant caused her injuries.

The final incident occurred two days later. E.G. testified she told defendant that she could not be around him anymore. He replied, "watch out." Later, she received a text message from defendant stating he was going to pick up something. According to the police officer who took the initial report, E.G. stated defendant said he would contact his homeboys and get something to use on her and that she believed he would get a gun. E.G.'s mother also testified her daughter "was very afraid that [defendant] might have a weapon" and declared defendant is "'going to get us. He's threatened to kill us. He knows where we live. . . . And he told me that . . . he has homies who he can contact and they will find us.'"

When asked about this incident at trial, E.G. denied telling the police she believed defendant had a gun. She admitted defendant told her that he would be "talking to his homies," but said this statement occurred at a different time. She claimed "it was probably just me being paranoid and me thinking he was talking about a gun."

The prosecutor confronted E.G. with contrary statements she wrote in support of the restraining order and her preliminary hearing testimony.

At the preliminary hearing she had testified, "'I just asked him if he still had a weapon. He . . . didn't say anything. And then a couple minutes later, he said, "Well, I'll talk to you later. I'll talk to my homies. I might pick up something for later."'" She also reluctantly admitted defendant had told her that he was a gang member and had seen a photograph of him with a gun.

Defendant testified in his own defense. He claimed E.G. "likes to . . . exaggerate things" and denied the foregoing incidents occurred. He claimed E.G. told him that she received the first black eye because of "'a fight in the streets.'" As for the second beating, defendant denied being with E.G. asserting, "I was actually trying to get away from her," but that she continued to stalk him. Nonetheless, he acknowledged maintaining a relationship with E.G. through the time of his arrest that included sexual relations on at least two occasions.

DISCUSSION

1. Psychiatric Evaluation

a. Background

At the preliminary hearing, E.G. testified about her mental illness and related treatment. In 2002 she was hospitalized for a month. Later, she was diagnosed with depression and bipolar disorder. Another hospitalization occurred in 2003 when she attempted suicide. She consulted with a therapist about an eating disorder and was prescribed medications, but did not take them because of side effects. In 2006, she again received treatment for bipolar disorder, mood problems, and eating disorders. In 2008, she started using methamphetamine to help cope with her mental illnesses. Later that year, she stopped taking methamphetamine and sought treatment.

After the hearing, defendant filed a motion to compel E.G. to undergo a psychiatric examination to determine her competency as a witness. The court denied the

motion, citing *People v. Anderson* (2001) 25 Cal.4th 543 and concluding the defense failed to meet its burden of establishing E.G.'s lack of competence.

At trial, defendant again sought to inquire into E.G.'s mental health. The court ruled E.G.'s history of mental illness and treatment was also not relevant to her credibility since the defense submitted no evidence to demonstrate that she suffered from these alleged mental illnesses on the dates in question.

Defendant argues the court erred in denying his attempts to have E.G. undergo a psychiatric evaluation. He contends the rulings violated his federal constitutional rights to due process and a fair trial by preventing him from "putting on the only defense available," i.e., E.G. "suffered from such a mental illness at the time of the incident[s] that her perceptions were not reliable . . . ." We affirm the court's rulings.

b. Analysis

Defendant first attacks E.G.'s competency to testify and her credibility. Competency to testify requires a person to be capable "of expressing himself or herself concerning the matter so as to be understood" and "understanding the duty . . . to tell the truth." (Evid. Code, § 701, subd. (a)(1) & (2).) "Capacity to communicate, or to understand the duty of truthful testimony, is a preliminary fact to be determined exclusively by the court, . . . and [the] trial court's determination will be upheld in the absence of a clear abuse of discretion. [Citations.]" (*People v. Anderson, supra,* 25 Cal.4th at p. 573.) Since unless "otherwise provided by statute," persons are deemed "qualified to be a witness" (Evid. Code, § 700), "the burden of proof is on the party who objects to the proffered witness . . . ." (*People v. Anderson, supra,* 25 Cal.4th at p. 573.) "'[*I*]*f there is evidence that the witness has those capacities* [i.e. to perceive and recollect], the determination whether he in fact perceived and does recollect is left to the trier of fact. [Citations.]' [Citations.]" (*Id.* at pp. 573-574.)

The court was presented with E.G.'s testimony from the preliminary hearing. It was able to conclude she had the ability to perceive, remember, and communicate the events that took place. As noted, defendant had the burden to show E.G. was not competent to testify and the court found that he failed to meet this burden.

E.G.'s exaggeration of events or inconsistent statements did not demonstrate she was incapable of understanding the duty to tell the truth, or to perceive, remember, and communicate concerning the facts underlying the criminal charges. "'The fact that a witness has made inconsistent and exaggerated statements does not indicate an inability to perceive [or] recollect . . . .' [Citation.] . . . A witness's uncertainty about his or her recollection of events does not preclude admitting his or her testimony. [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 356-357.)

The court also noted "just because somebody changes their stories doesn't mean they have a mental illness." But even if E.G. did, the fact a witness "suffered from mental disorders" (*People v. Lewis, supra,* 26 Cal.4th at p. 360), was delusional (*People v. Anderson, supra,* 25 Cal.4th at p. 574), or described as "'a mental defective'" (*People v. Jones* (1968) 268 Cal.App.2d 161, 166) would not render the person incompetent as a witness. Consequently, her purported "mental defect[s] or insane delusions [would not] necessarily reflect that [she] lack[ed] the capacity to perceive or recollect. [Citations.]" (*People v. Lewis, supra,* 26 Cal.4th at p. 356.)

Defendant also sought to use the psychiatric examination to impeach E.G.'s credibility. The court invoked its broad discretion to deny the request for a psychiatric examination of a mentally or emotionally impaired witness under *Anderson, supra,* 25 Cal.4th 543. It ruled her past history of mental illness and treatment was not relevant to her credibility since the defense submitted nothing demonstrating she suffered from mental illness on the dates alleged in the information.

Under current California law, while in some circumstances "expert psychiatric testimony may be admissible to impeach the credibility of a prosecution

witness where the witness' mental or emotional condition may affect the ability of the witness to tell the truth" (*People v. Cooks* (1983) 141 Cal.App.3d 224, 302), "[t]he use of psychiatric testimony to impeach a witness is generally disfavored [citations]." (*People v. Marshall* (1996) 13 Cal.4th 799, 835; see also *People v. Anderson, supra,* 25 Cal.4th at p. 575; *People v. Alcala* (1992) 4 Cal.4th 742, 781; *In re Darrell T.* (1979) 90 Cal.App.3d 325, 335.) "California courts have viewed such examinations with disfavor because '"[a] psychiatrist's testimony on the credibility of a witness may involve many dangers: the psychiatrist's testimony may not be relevant; the techniques used and theories advanced may not be generally accepted; the psychiatrist may not be in any better position to evaluate credibility than the juror; difficulties may arise in communication between the psychiatrist and the jury; too much reliance may be placed upon the testimony of the psychiatrist; partisan psychiatrists may cloud rather than clarify the issues; the testimony may be distracting, time-consuming and costly."' [Citation.]" (*People v. Alcala, supra,* 4 Cal.4th at p. 781.)

We find no error here. First, E.G. freely acknowledged at trial she was frequently "out of control" and had not been "mentally well." Second, granting a request that a witness be examined by a psychiatrist is generally permissible only if "'little or no corroboration supported the charge and if the defense raised the issue of the effect of the complaining witness' mental or emotional condition upon her veracity.' [Citation.]" (*In re Darrell T., supra,* 90 Cal.App.3d at p. 335.) Contrary to defendant's suggestion, the prosecution presented corroborating evidence in the form of E.G.'s prior oral and written statements and testimony, photographs of her physical condition, and the observations of her mother and a police officer. E.G. sought to minimize or contradict this evidence when testifying at trial. But "[t]he fact a witness makes inconsistent and exaggerated statements does not compel a different conclusion. [Citation.]" (*People v. Marshall, supra,* 13 Cal.4th at p. 835; see also *People v. Knox* (1979) 95 Cal.App.3d 420, 431.)

A court has broad discretion to refuse the request for a psychiatric examination of a mentally or emotionally impaired witness. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 576.) No abuse occurred in this case.

Defendant asserts that his constitutional right to confront and cross-examine E.G. was severely inhibited by the trial court refusing to order her to undergo a psychiatric evaluation. But "[a] person's credibility is not in question merely because he or she is receiving treatment for a mental health problem." (*People v. Pack* (1988) 201 Cal.App.3d 679, 686, overruled on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.)

In *Anderson*, the defendant argued the trial court violated his constitutional rights by sustaining the prosecutor's relevancy objection to his efforts to question a witness's mental health. The Supreme Court disagreed. "It is a fact of modern life that many people experience emotional problems, undergo therapy, and take medications for their conditions. . . . Even if examination of a witness about treatment for mental illness might sometimes be relevant, here evidence that Baros had received therapy would have added little to the specific evidence, largely undisputed, that she had significant fantasies. Defense counsel was allowed to cross-examine Baros fully about the specific delusions that might impair the accuracy of her testimony. Nothing more was necessary. Hence, the trial court acted properly in sustaining a relevancy objection when defense counsel asked Baros whether she had ever been in therapy." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 579, fn. omitted.)

Apparently recognizing the foregoing state law authorities, defendant cites numerous United States Supreme Court decisions acknowledging a criminal defendant's right to present a defense. He suggests these cases support the existence of a federal constitutional right to pretrial discovery.

This argument is unpersuasive. "[T]he high court has explained, '[t]here is no general constitutional right to discovery in a criminal case . . . ' and '"the Due Process

Clause has little to say regarding the amount of discovery which the parties must be afforded. . . .' [Citation.]' [Citation.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 109-110, quoting *Weatherford v. Bursey* (1977) 429 U.S. 545, 559 [97 S.Ct. 837, 51 L.Ed.2d 30]; see also *Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1243 ["Both the United States and California Supreme Courts have held that a criminal defendant does not possess a general constitutional right to discovery"].) None of the decisions cited in the opening brief hold a defendant has a federal constitutional right to an order compelling a complaining witness to undergo a psychiatric examination to assist the defense in questioning the witness's competency or credibility. In fact, at least two federal circuit courts have rejected claims a criminal defendant's right to due process or confrontation were violated by a trial court's refusal to order complaining victims submit to a psychological examination. (*United States v. Rouse* (8th Cir. 1997) 111 F.3d 561, 566-568; *Gilpin v. McCormick* (9th Cir. 1990) 921 F.2d 928, 930-932.)

As for defendant's constitutional right to confront and cross-examine witnesses, "'the Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."' [Citations.]" (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1265.) Defendant was not deprived of his right to effective cross-examination. E.G. changed her story numerous times and defendant was allowed to fully question her about the reasons for the inconsistencies between her prior statements and testimony and her trial testimony. The trial court stated that "[y]ou're going to have the ability to impeach her on these six different versions that you've indicated she's told." Obviously the jury found some parts of her testimony lacked credibility because they returned not guilty verdicts on two of the seven counts.

Finally, the California Supreme Court has "long observed that, '[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [state or federal constitutional] right to present a defense.' [Citations.]"

(*People v. Robinson* (2005) 37 Cal.4th 592, 626-627, fn. omitted; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1249.) We conclude the court did not violate defendant's constitutional rights by denying his request to have E.G. submit to a psychiatric examination.

2. Relevance of Gang Membership Testimony

a. Background

Over defendant's objection, E.G. testified defendant "said he was a gang member." The court allowed this testimony for the limited purpose of showing she was in fear when he purportedly made a criminal threat, and instructed the jury: "[E.]G. testified that the defendant told her that he used to be a gang member. This evidence was admitted for the limited purpose of the effect such evidence had on [E.]G.'s state of mind as it relates to counts 4 and 7 [both charging the making of a criminal threat] and not for the truth. This evidence cannot be considered by you for any other purpose." On appeal, defendant claims that since this case did not involve gang charges, the trial court erred by admitting evidence of his purported gang membership.

b. Analysis

Because it creates a danger the jury will infer the defendant is guilty because of his association (*People v. Cardenas* (1982) 31 Cal.3d 897, 904-905), the Supreme Court has held evidence of gang membership should not be admitted if its probative value is minimal and has condemned the introduction of such evidence if it is only tangentially relevant to the charged offenses (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049). However, gang affiliation evidence is admissible where it is relevant to a material issue in the People's case other than as character evidence. (*People v. Sandoval* (1992) 4 Cal.4th 155, 175 [gang evidence admissible where relevant to motive].) Although the trial court must carefully scrutinize the evidence before admission, it has

wide discretion in determining the admissibility of such proof. (*People v. Williams* (2009) 170 Cal.App.4th 587, 606.)

To find defendant guilty of making a criminal threat in this case, the jury needed to find the purported threat caused the victim to be in fear and that such fear was reasonable. (Pen. Code, § 422.) Here, the prosecutor introduced the testimony about defendant's gang membership solely to show the reasonableness of E.G.'s fear as it related to the criminal threats charged in counts 4 and 7. Further, the court expressly limited this testimony to that purpose by giving CALCRIM No. 303, telling the jury defendant's purported gang membership was "admitted for the limited purpose of the effect such evidence had on [E.]G.'s state of mind as it relate[d] to" to the criminal threat charges and it "cannot be considered by you for any other purpose."

Although defendant concedes that "[w]hile the references to gang membership in this record are not overwhelming, as they have been in other cases in which the reviewing court found error in its admission," he argues that "its admission here still denied [him] a fair trial and due process of law." We disagree. The jury found defendant guilty on count 7, but not guilty on count 4. The trial court did not abuse its discretion.

3. Motion to Strike Prior Serious Felony Conviction

a. Background

At sentencing, defendant admitted he had previously been convicted of making a criminal threat, a serious felony. (Pen. Code, §§ 422 & 1192.7, subd. (c)(38).) He moved to strike the prior conviction for sentencing. The court reviewed the probation officer's report, which stated defendant had twice previously been placed on probation, plus juvenile probation, and he violated probation for a prior conviction for violating Penal Code section 422. The report also documented numerous other criminal violations defendant had committed.

In denying the motion, the court cited defendant's initial failure to enroll in a 52-week batterer's program for his prior conviction. It acknowledged he reenrolled in the program and completed it; but was concerned with the similarities between the prior conviction and defendant's current case. It found he did not use the "tools" provided by the batterer's program "to control the type of behavior that gets you in these bad situations" "in order to deal with the situation and, tragically, went back to his almost old ways, so to speak." Defendant now argues the court abused its discretion by denying his motion to strike a prior serious felony conviction for sentencing. We disagree.

b. Analysis

The court has the discretion to strike prior felony conviction allegations. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 524, fn. 11.) In ruling on such a motion, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i) & 1170.12), was devised to provide longer sentences for career criminals. (*People v. Strong* (2001) 87 Cal.App.4th 328, 332.) It prescribes a sentencing norm that circumscribes the trial court's discretion to depart from it. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) This sentencing scheme presumes a sentence conforming to these norms is both proper and rational. (*Ibid.*) However, a trial court can abuse its discretion in failing to strike a prior strike conviction in limited circumstances, such as when the sentencing norms produce an arbitrary, capricious, or patently absurd result. (*Ibid.*) The burden is on the party attacking the sentence to show the sentence imposed was irrational or arbitrary. (*Id.*

at p. 376.) If the party fails to meet its burden, the trial court is presumed to have acted properly and its ruling will not be set aside on review. (*Id.* at pp. 376-377.)

The record contains ample evidence to support the court's ruling. Notably, it is also devoid of any information defendant met his burden of demonstrating compliance with the Three Strikes law would result in an irrational or arbitrary sentence. The court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.